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OFFICE OF PETITIONS

USDA-ARS-OFFICE OF TECHNOLOGY TRANSFER
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WESTERN REGIONAL RESEARCH CENTER
800 Buchanan St.
Albany CA. 94710

In re Application of :
Niu DONG et al :
Application No. 10/797,346 :
Filed: March 10, 2004 :
Attorney Docket No. 0109.03 :
ON PETITION

This is in response to the communication, filed July 2, 2009 , to revive the above-identified application, which is being treated as a petition under 37 CFR 1.181 to withdraw the holding of abandonment.

The petition is **DISMISSED**.

Any request for reconsideration of this decision should be submitted within two (2) months from the mail date of this decision and be entitled "Renewed Petition to Withdraw the Holding of Abandonment under 37 CFR 1.181." See 37 CFR 1.181(f).

On January 11, 2008, the Office mailed a final Office action, which set a three month shortened statutory period to reply. The application became abandoned on April 8, 2008, for failure to submit a timely and proper response to the final Office action. On August 1, 2008, the Office mailed a Notice of Abandonment.

In the present petition, petitioner requests that the Office withdraw the holding of abandonment since any patent term adjustment(PTA) will be reduced under the provisions of 37 CFR 1.704(c)(4) and in any event the Office could require a terminal disclaimer as a condition of granting the petition to withdraw the holding of abandonment. Finally, petitioner submits that applicant replied with a bona fide attempt to advance prosecution by responding with an amendment to address the objections given in the final rejection.

DISCUSSION OF PETITION TO WITHDRAW THE HOLDING OF ABANDONMENT

A review of the record indicates that the petition should be properly dismissed as untimely under 37 CFR 1.181(f), which states that any petition not filed within two months of the mailing date of the action or notice from which relief is requested, may be dismissed as untimely. This application was statutorily abandoned on April 12, 2008. Applicant failed to timely file a proper reply to the Office action mailed January 11, 2008, within the meaning of 37 CFR 1.113(a). Petitioner's acknowledgement of PTA adjustments has no bearing on the requirement of 37 CFR 1.181(f) to promptly file; consideration of a terminal disclaimer here would not be an issue, given the filing date of the application. Here there is no requirement for a Terminal Disclaimer.

ALTERNATIVE VENUE

Petitioner is strongly encouraged to consider filing a petition under 37 CFR 1.137(b) to revive an unintentionally abandoned application instead of filing a renewed petition under 37 CFR 1.181 or a petition under 37 CFR 1.137(a).

A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by:

- (1) The reply required to the outstanding Office action or notice, unless previously filed. In nonprovisional utility application abandoned for failure to respond to a non-final Office action, the required reply may be met by filing either (A) an argument or amendment under 37 CFR 1.111 or (B) a continuing application under 37 CFR 1.53(b).
 - (2) The petition fee as set forth in 37 CFR 1.17(m);
 - (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unintentional. The Director may require additional information where there is a question whether the delay was unintentional.

A form for filing a petition to revive an unintentionally abandoned application accompanies this decision for petitioner's convenience. If petitioner desires to file a petition under 37 CFR 1.137(b) instead of filing a request for reconsideration, petitioner must complete the enclosed petition form (PTO/SB/64) and pay the petition fee.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By FAX: (571) 273-8300
Attn: Office of Petitions

By hand: Customer Service Window
Randolph Building
401 Dulany Street
Alexandria, VA 22314

Telephone inquiries related to this decision may be directed to the undersigned at (571) 272-0602.



Thurman K. Page
Petitions Examiner
Office of Petitions